

**COMMENTS TO THE STATE ENGINEER-
REGARDING PROPOSED STATUTORY LANGUAGE
AND
POST WORKSHOP COMMENTS**

The Supreme Court's opinion in Great Basin Water Network ("GBWN") v. DWR and SNWA contains two sentences that raise questions regarding the validity of the State Engineer's action in issuing permits, orders or rulings when the application, if filed on or after January 1, 1947 but before July 2, 2002, was not acted upon within 1-year after the final protest date. These questions not only affect the State Engineer's ability to manage the essential water resources of the State, but could also dramatically impact applicants, permittees and those seeking project financing. The troubling language reads:

We conclude that "pending" applications are those that were filed within one year prior to the enactment of the 2003 amendment. And, in the absence of statutory language and legislative history demonstrating an intent that the amendment apply retroactively to SNWA's 1989 applications, we determine that the State Engineer could not take action on them under the 2003 amendment to NRS 533.370.

Not all action of the State Engineer in connection with filed applications results in the issuance or denial of a permit. Some actions result in the issuance of an order or ruling rather than the immediate approval or denial of a permit. Subsequent to January 1, 1947 the State Engineer has continually acted upon applications later than 1-year after the final protest date by issuing permits, orders or rulings. Further, many of these issued permits have become certificated rights. These actions have been relied upon by the State Engineer; federal, state and local agencies; and owners, permittees, lenders, and others.

If as the Supreme Court stated, the State Engineer could not take action on SNWA's applications without re-noticing or re-filing the applications, could the State Engineer act on irrigation, stock watering, mining, commercial, industrial or quasi-municipal permits because they were also subject to the same 1-year action period after January 1, 1947 and prior to the 2003 amendment?

An additional concern is raised by the Court's failure to mention, much less discuss, the effect of 533.370(3) which reads as follows:

If the State Engineer does not act upon an application within one year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.

This language was added in 2003 in the very same amendment draft (1st Reprint) in which the language of 533.370(b) was added in 2003. The provision added in 2003 under 533.370(3) applied to applications for every manner of use allowed under Nevada water law. Because this provision was not mentioned by the Court, it is now unclear what effect it had on applications that had been pending for more than one year prior to July 1, 2003.

The legislature should, if the Governor calls a special session, affirmatively address these questions as they relate to all applications, permits, orders and rulings (other than the applications that are the subject of the GBWN v. DWR and SNWA litigation) to provide assurance to the State Engineer, the courts, applicants, permit holders, lenders and the general public that there will not be any disruption to water rights under Nevada's water laws. Now is **not** the time to place additional impediments on successfully acquiring financing for projects within Nevada.

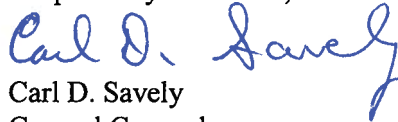
I am in agreement with the project financing and economic comments set forth in Vidler's letter dated March 26, 2010, and the comments regarding the propriety of a legislative solution set forth in the comments submitted by letter from Gordon DePaoli dated March 15, 2010.

Because the Court's decision raises questions about the potential validity of permits, orders and rulings, I believe it will provide greater clarification to the State Engineer, other federal, state and local agencies, permittees and lenders if the curative language addressed more than just the applications pending on or before July 1, 2002. As the State Engineer is aware, the action on some applications that occurred more than one (1) year after the expiration of the action period (as identified by the Court) resulted in the issuance of an order or ruling rather than the issuance of a permit.

I join with Vidler, Virgin Valley Water District and Southern Nevada Water Authority in supporting Statutory Change Version 3, except for the proposed change in subsection 8(d), as the preferred solution because it most clearly answers the questions raised by the Court's decision. I do not support the proposed change in subsection 8(d) because if the application is opened again to "any person" then further delays will likely result. It is reasonable to anticipate "any person" asking the State Engineer for the right to participate in such hearings will also ask for several years to collect and analyze relevant data (because they had not previously been involved with or working on the matter) and then allege due process violations in the event the State Engineer denied these requests.

My second preference, should the State Engineer decline to support Version 3, is Statutory Change Version 5, submitted by Hugh Ricci, the State Engineer in 2003.

Respectfully submitted,



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